



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 140 OF 2012

CHINA PETROLEUM PIPELINE BUREAU LIMITED.....PLAINTIFF

VERSUS

ANDERSON NDWINGA NJERU T/A BRAJAN ENTERPRISES.....1<sup>ST</sup> DEFENDANT

MARY WAMBUI.....2<sup>ND</sup> DEFENDANT

DUNCAN MUGAMBI MUTUNGI T/A WRIGHT AUCTIONEERS.....3<sup>RD</sup> DEFENDANT

**R U L I N G**

1. Before the court is **Notice of Motion** application filed by the 1<sup>st</sup> Defendant dated **13<sup>th</sup> November 2012** and filed in court on **13<sup>th</sup> November 2012**. The application seeks the following orders:-

**1. Spent**

**2. That an interim measure of protection by way of an order directing that the two Toyota Land Cruiser Motor Vehicles registered as KBL 525M and KBL 526M respectively, the subject matter of this suit be held and kept in the custody of the court or elsewhere as the court may direct pending the hearing and determination of this suit.**

**3. That an interim measure of protection by way of Mareva injunction be granted to restrain the Plaintiff whether by itself, agents, servants or advocates from dissipating its assets and in particular from selling two Toyota Land Cruiser Motor Vehicles registered as KBL 525M and KBL 526M respectively, the subject matter of this suit until the final determination of this suit or until further orders.**

**4. Costs in the application be provided for.**

2. The grounds for the application is set therein and the application is supported by the affidavit of **ANDERSON NDWIGA NJERU** dated **13<sup>th</sup> November 2012** with its annextures.

3. The Application is opposed vide a replying affidavit of **LENG DONGSHENG** dated **19<sup>th</sup> November 2012** and that one of **BONIFACE NGINYO MWARA** of the same date.

4. In brief, the history of the current application is summarised by a Ruling delivered by Justice George Odunga on 19<sup>th</sup> April 2012 at page 9 thereof as follows:-

***“ . . . it is my considered view that this is a matter which should be decided on a balance of convenience. Since the Plaintiff is in possession and the 1<sup>st</sup> Defendant does not claim ownership of the vehicles, the maintenance of the status quo which is the cornerstone of prohibitive injunctive orders would dictate that the possession of the vehicle remain with the Plaintiff. Accordingly, the injunction sought in prayer 3 of the said motion is granted on condition that the Plaintiff deposits the sum of Kshs.3,600,000/= in a joint interest earning account to be opened in the names of the advocates for the parties within 21 days. As mandated under the provisions of***

**Order 40 Rule 6 the lifespan of these orders is one year unless ordered otherwise.”**

5. That was the Ruling in an application by the Plaintiff for injunctive orders which the court nevertheless did not give, but the court granted the possession of the suit motor vehicle to the Plaintiff pending the hearing of the suit herein and on the condition that the 1<sup>st</sup> Defendant claim over the suit property of Kshs.3,600,000/= was deposited in the name of the advocates. Further history of the application is found in that Ruling of 19<sup>th</sup> April 2012, and my Ruling dated 4<sup>th</sup> October 2012 on a related matter.

6. The current application is brought by the 1<sup>st</sup> Defendant upon his fears that the Plaintiff, who is in the possession of the suit motor vehicles, has allegedly advertised the same for sale, and if that happens, the 1<sup>st</sup> Defendant fears that when this matter is finally heard and determined there will be no suit property and that any Judgement in favour of the 1<sup>st</sup> Defendant would be rendered nugatory. The 1<sup>st</sup> Defendant also states that the money loaned to the 2<sup>nd</sup> Defendant (**who the 1<sup>st</sup> Defendant alleges to be the true owners of the suit motor vehicle**) was Kshs.3,600,000/= at 30% interest and that the sum now due on interest alone is over Kshs.600,000/=.

7. The 1<sup>st</sup> Defendant's current application is meant to preserve the suit property, and is in the nature of a Mareva injunction. **Halsbury's Laws of England, 3<sup>rd</sup> Edition, Volume 3 (1) page 329 to 331** defines Mareva injunction as follows:

**“A Mareva injunction is an order of the court restraining a party to proceedings from removing from the jurisdiction of the court, or otherwise dealing with assets, located within that jurisdiction and in more limited circumstances from dealing with assets located outside the jurisdiction. The foundation of the court's jurisdiction is the need to prevent judgements of the court from being rendered ineffective, whether by the removal of the Defendant's assets from the jurisdiction, or by dissipation.”**

The principle of granting a Mareva injunction or freezing order was laid down in the case of **Mareva Compania Naviera SA - VS – International Bulkcarriers SA (1952) 2 Lloyd's Rep 509**. In his Judgement Lord Denning MR, stated as follows:-

**“In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgement for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before Judgement, the Court has jurisdiction in a proper case to grant an interlocutory judgement so as to prevent him disposing of those assets.”**

Under the scope and tenor of the relief under Order 40 of the Civil Procedure Rules, the 1<sup>st</sup> Defendant has the onus of proving that the Plaintiff:-

**a. Is about to dispose of the whole or any part of his property.**

**b. Is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court.**

8. The Applicant has exhibited in his application, thereto referred to as **ANN1** and **ANN2** two newspaper advertisements, **Sunday Nation dated 28<sup>th</sup> October 2012** and **Thursday the Standard dated 30<sup>th</sup> October 2012** of the motor vehicles which are the subject matter of the suit. The Applicant further states that the Plaintiff is in possession of the suit motor vehicles despite the fact that the Applicant holds the original logbooks of the said motor vehicles which he acquired from the 2<sup>nd</sup> Defendant after the 1<sup>st</sup> Defendant/Applicant advanced Kshs.3,600,000/= as loan to the 2<sup>nd</sup> Defendant.

9. The court will not go into the fact that the 2<sup>nd</sup> Defendant who is alleged to be the owner of the said suit motor vehicles cannot be traced. The same suit motor vehicles are also claimed by the Plaintiff who alleges to have bought them at a cost of over Kshs.12,000,000/= from Toyota Kenya Limited.

10. In essence, therefore, the 1<sup>st</sup> Defendant's claim is only limited to the alleged loan of Kshs.3,600,000/= given to the 2<sup>nd</sup> Defendant plus any applicable interest, if at all. This interest for the 1<sup>st</sup> Defendant seems to have been fully secured when the court in this matter directed that the said Kshs.3,600,000/= be deposited in an interest earning account in the joint names of the parties' counsel. This was done but the 1<sup>st</sup> Defendant/Applicant still remains apprehensive that the suit property may be dissipated.

11. The Plaintiff has totally denied that they have caused the above said advertisements. Indeed, Mr. Kimathi for the Plaintiff gave a personal undertaking to this court on 15<sup>th</sup> November 2012 that they had no intention to sell, and that they would in fact not sell the said motor vehicles in the possession of the Plaintiff. He further said that there was no need to hear this application given his undertaking.

12. In his replying affidavit opposing the application, **MR. LENG DONGSHENG** who describes himself as the Financial Manager of the Plaintiff Company confirmed that the two motor vehicles **KBL 525 M** and **KBL 526 M** are in the Plaintiff's company possession. He further confirmed that the Plaintiff has not advertised or caused to advertise the said motor vehicles for sale as alleged or at all, noting that in any event it is not possible to sell the said motor vehicles since their respective log books are in the possession of the Applicant, Mr. A. Njeru.

13. Mr. Boniface Nginyo Mwaura whose telephone number was put in the said advertisement as a contact person has also denied knowledge of involvement in the said advertisement and has denied the same through his affidavit. It now remains upon myself to make out a Ruling in this matter.

14. It seems to me that the following are the issues for determination in this application:-

- a. Whether the suit motor vehicles are threatened by a possible sale by the Plaintiff.*
- b. Whether the Plaintiff has any other remedie(s) apart from the suit property.*
- c. Whether the Mareva injunction prayed for can be granted.*

15. To begin with the first issue, I must note for the record that the court on 19<sup>th</sup> April 2012 granted the Plaintiff the possession of the suit motor vehicles on condition that the Plaintiff deposited Kshs.3,600,000 as security in the joint names of the parties in an interest earning account. That was complied with. This means that to some extent the suit property is secure as long as the said security earns interest. Should the Plaintiff in any way waste the suit property, the 1<sup>st</sup> Defendant is not the party likely to lose most. Having said that, I have also considered the application and the opposing affidavits which state clearly that the Plaintiff has no intention at all of selling the suit motor vehicles and that indeed the Plaintiff did not put out the said advertisement. Even if I did not believe that, there is an undertaking by Arimi Kimathi given to me in court on 11<sup>th</sup> November 2012 that the Plaintiff would not sell the suit property. Undertakings have serious legal consequences especially when given by counsel and I want to believe that Mr. Kimathi's undertaking will be his bond. In addition, I must say, that under the current disputed status of the suit motor vehicles, and considering that their alleged owner the 2<sup>nd</sup> Defendant has not been traced to participate in these proceedings, it is my view that any of the parties to this suit, not limited to the Plaintiff, could easily have put forward the said advertisement.

16. Finally, it must be noted that the logbooks of the suit motor vehicles is with the 1<sup>st</sup> Defendant/Applicant. The suit motor vehicles cannot lawfully be sold without his knowledge. In my view, to answer the first issue, the suit motor vehicles are not at all threatened by a possible sale by the Plaintiff without the involvement of the 1<sup>st</sup> Defendant/Applicant.

17. In addition, and to address issue number two, and as I have said earlier, the interest of the 1<sup>st</sup> Defendant is protected by the deposit of Kshs.3,600,00/= which is earning interest in the joint names of the parties advocates. The 1<sup>st</sup> Defendant may argue that the deposit may not be adequate. That is possible. However, it remains true that the 1<sup>st</sup> Defendant's claim is a money claim of Kshs.3,600,000/= plus interest if any or at all. To my mind, a money claim can be, satisfied any time by award of damages. That means that should the Plaintiff act unlawfully and dispose off the said suit motor vehicles the 1<sup>st</sup> Defendant/Applicant will not suffer loss which cannot be compensated for by damages or even aggravated damages.

18. Pursuant to the foregoing paragraphs of this Ruling this court cannot grant the Mareva injunction being sought herein against the Plaintiff.

19. In the upshot the 1<sup>st</sup> Defendant's application dated 13<sup>th</sup> November 2012 is not merited and is herewith dismissed with costs of the Plaintiff.

**DATED, READ AND DELIVERED AT NAIROBI THIS 30TH DAY OF April 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Kimathi for Plaintiffs

Sirima for Defendants

Teresia – Court Clerk